No. 14999.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK ROSS,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Jurisdictional Status.

Before proceeding to the merits, certain statements in appellee's brief in regard to jurisdictional matters are deserving of brief attention.

Appellee refers to the fact that its answer has raised, by way of affirmative defense, an issue as to diversity of citizenship of the parties. Manifestly, this issue was not passed upon by the court below in granting a stay of proceedings pending arbitration, and therefore it presents nothing for consideration by this Court on the present appeal.

Appellee next contends that the order appealed from in the present case might not be appealable under the rule

voiced in *Baltimore Contractors, Inc. v. Bodinger,* 348 U. S. 176 (1955). Appellee concedes that an appeal will lie where a stay order has been made in an action at law (Appellee's Br. p. 2), and that the complaint in the instant case appears to plead a cause of action at law for money. Nevertheless, appellee suggests that the court might conclude that this is an equitable proceeding. The only ground offered for this proposition is the possibility that an accounting might be required in the trial court to determine the precise amount due appellant as a result of appellee's breach of contract. Neither of the cases cited on this point by appellee (*Coward v. Clanton,* 122 Cal. 451, 55 Pac. 147 (1898); *Hapgood v. Berry,* 157 Fed. 807 (C. C. A. 8, 1907)), support its proposition.

The pertinent portion of *Coward v. Clanton, supra,* stands rather for the proposition that an accounting may be had even if the action is basically one at law rather than in equity. The court's language on this point was as follows (*supra,* 122 Cal. at pp. 453-454):

> "I do not understand the suggestion that the court has no jurisdiction to compel an accounting unless a partnership was created. If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done. (*San Pedro etc. Co. v. Reynolds,* 121 Cal. 74.) Whether the facts would have given jurisdiction to a court of equity is of no consequence. We have no such courts, but our courts afford the remedies to which the facts may show the parties are entitled, whether legal or equitable."

Hence that case supports the position of appellant rather than appellee.

In *Hapgood v. Berry, supra,* the court, in listing the questions which it was considering (157 Fed. at 811), did not even include the one involved here. The *Hapgood* case involved a complex series of realty transactions between the parties over a period of many years. The parties were in a fiduciary relationship and one of them held title to property in trust for certain purposes. Of course, it is not surprising that in such a situation the court would find there was an adequate basis for awarding equitable relief, but it is equally clear that the *Hapgood* case has no bearing on the present inquiry. Here the appellant's cause of action, as framed by the pleadings, is primarily and simply one to recover damages arising out of a breach of contract.

Appellee suggests that in determining whether a proceeding is legal or equitable, the courts are not bound by the pleadings or the form of action, but it is to be noted that appellee suggests nothing apart from the pleadings or form of action which indicates that the action here is not one at law in both form and substance.

The procedural insufficiency noted by appellee (Appellee's Br. pp. 3-4) has been corrected by the entry of a formal order on April 11, 1956. A supplement to the printed record including this order and appropriate Notice of Appeal is in the process of transmission to the Court.

ARGUMENT.

I.

The Contract of the Parties Does Not Evidence a Transaction Involving Interstate Commerce.

Turning from jurisdiction to the merits of the present controversy, we suggest that appellee has failed in its attempts to explain away the arguments presented in appellant's opening brief which demonstrate that the contract involved here does not evidence a transaction involving interstate commerce.

Appellee's assertion that the present contract involves the production and distribution of motion pictures is untenable. While it is true that the price received by appellant for his sale of rights to appellee would be measured by the amount of profit arising from appellee's production and distribution of a motion picture based on those rights, such a method of computing price in no way alters the fact that *the only transaction involved in the contract* between appellant and appellee was *a sale of rights* in certain literary property. In short, appellee fails to show wherein the caption of the document in question, "Agreement of Sale," fails to evidence the true nature of the transaction.

The contention that the interstate character of many of appellee's other activities stamps the present contract as one evidencing a transaction involving interstate commerce, is likewise without merit. Reduced to a syllogism, appellee's argument appears to be the following:

> *Major Premise:* Appellee is engaged in interstate commerce in connection with the production and distribution of motion pictures.

Minor Premise: The instant contract is one to which appellee is a party.

Conclusion: The instant contract evidences a transaction involving interstate commerce.

Thus, stripped of its casuistry, appellee's argument reveals itself as a patent *non sequitur.*

The crucial point is that for purposes of determining the applicability of the Federal Arbitration Act, it is necessary to determine not merely whether either or both the parties to the contract are engaged in interstate activities, but rather whether the very *transaction evidenced by the contract in question* (in the present case a sale of rights in literary property) does itself involve interstate commerce. The answer to this question in the present case, we submit, must be emphatically in the negative.

Neither *United States v. Schubert,* 348 U. S. 222 (1955), nor *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923), cited by appellee, are in point here. In the *Schubert* case, *supra,* the Court, in considering an antitrust action against a theatrical organization whose activities were nationwide in character, referred only to the production, distribution and exhibition of motion pictures and not to a sale of motion picture rights such as are involved here. Moreover, in the passage quoted, the Court was concerned with the meaning of "trade or commerce" rather than with whether that trade or commerce was local or interstate in character, for it was the former rather than the latter problem which posed the crucial question in the *Schubert* case.

The activities involved in the *Binderup* case, *supra,* as indicated in the passage cited by appellee itself, were

clearly interstate. They "consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees." We have no quarrel with the Court's finding of interstate commerce under those circumstances, but that is hardly the type of activity involved here.

Appellee devotes considerable attention to the opinion of the United States Supreme Court in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U. S. 219 (1948), which, like the *Schubert* case, *supra,* was an anti-trust action, in this case one arising out of an agreement between California sugar refiners selling in interstate commerce to pay a uniform price for beets purchased in California. The Court there held (applying the "Shreveport doctrine") that even though the individual purchases involved might be intrastate in character, their over-all effect under the agreement would have a serious impact upon interstate commerce and therefore such local purchases might be subjected to Congressional regulation in the interest of protecting the national economy from such restraints of trade.[1] While we do not question the power

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[1]The language of the Court would indicate that the activities there involved intrastate commerce, for the Court stated at page 234:

"In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared

of Congress, in furtherance of a broad regulatory scheme, to curtail intrastate activities affecting interstate commerce where the control of such intrastate activities is required to make effective the attempt at interstate regulation, we submit that this is hardly the type of problem involved in the present case, which concerns the applicability of the federal arbitration mechanism to an isolated local sale of literary property.

Appellee states:

> "The modern legal doctrine of commerce applicable to industries, such as the motion picture industry, which embrace production, distribution and marketing activities, must not yield to decisions of yesteryear, cited by appellant, which hold that a grocery store or gas station may not be in interstate commerce."[2] (Appellee's Br. pp. 10-11.)

We believe that this statement epitomizes appellee's misconception of the present contract.

The question here is not, as appellee suggests, the nature of the motion picture industry,[3] but rather the

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in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

"The Shreveport doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach."

[2]It should be noted that these decisions of "yesteryear", cited by appellant, were rendered in 1939 and 1950, respectively.

[3]The interstate activities of the motion picture industry are hardly more impressive than those of the petroleum industry, which was involved in the *Spencer* case, *infra,* apparently the "gas station" case referred to on page 11 of appellee's brief.

nature of the transaction involved here, namely, a sale of motion picture rights in literary property. As to the nature of those rights, we submit that the following language from *Spencer v. Sun Oil Co.,* 94 Fed. Supp. 408 (D. Conn., 1950), quoted in appellant's opening brief, is peculiarly appropriate:

> ". . . it would seem that what would otherwise be a purely intrastate transaction cannot be transformed into a transaction in interstate commerce merely because the commodity sold is taken by the purchaser across state lines and used in another state."

In the present case, the subject of sale is even further removed from interstate commerce, for it is *not the rights sold* (which are the subject matter of the contract in question) but rather a motion picture subsequently to be made from their exercise that is to be taken into the stream of interstate commerce.

Appellee stresses the fact that the Federal Arbitration Act refers to contracts evidencing transactions "involving" commerce rather than transactions "in" commerce, and suggests that Congress must have intended to include all contracts "affecting" commerce. Obviously this conclusion does not follow. Had Congress intended to cover all transactions "affecting" commerce, it undoubtedly would have said so in plain terms, as it has done in other statutes where it so intended. The reason for Congress' failure to include all transactions "affecting" interstate commerce within the scope of the Federal Arbitration Act is manifest. Here the Legislature was not concerned with a vast regulatory scheme, the execution of which might require the curtailment of intrastate activities. Rather, Congress was merely attempting to devise a suitable

arbitration procedure for interstate transactions. Any suggestion that the Act's coverage is not so limited has been put to rest by the recent decision of the United States Supreme Court in *Bernhardt v. Polygraphic Co.,* 350 U. S. 198 (1956), discussed in appellant's opening brief.

Culver v. Kurn, 354 Mo. 1158, 193 S. W. 2d 602 (1946), cited in support of appellee's attempt to equate "involving" with "affecting", concerned a purported railroad rule whereby the employment of a worker was said to be automatically terminated when the employee was "involved in an accident." The court, in pointing out that all the employees involved in a given accident had not been so treated, made the statement quoted (out of context) by appellee. In view of the vast difference in the provisions being interpreted, we fail to see how the *Kurn* case, *supra,* sheds any appreciable light on the issues raised in this appeal.

Petition of Prouvost Lefebvre, 105 Fed. Supp. 757 (S. D. N. Y., 1952), and *Wilson & Co. v. Fremont Cake & Meal Co.,* 77 Fed. Supp. 364 (D. Neb., 1948), which are cited by appellee as indicating a trend toward a broad view of commerce under the Arbitration Act, are clearly distinguishable from the instant case. The *Lefebvre* case, *supra,* involved interstate negotiations culminating in an interstate sale of wool between a buyer and seller whose plants were located in different states. No such transaction is involved here.

Wilson & Co. v. Fremont Cake & Meal Co., supra, involved a sale of soy bean oil which was to be shipped from the seller in Nebraska to the buyer in Illinois—obviously a transaction involving interstate commerce. It should

be noted that the court in the *Wilson* case, *supra,* did not even regard the Federal Arbitration Act as limited to contracts involving interstate commerce, so that the "trend," if any, which it represents, has since been repudiated by the United States Supreme Court. (*Bernhardt v. Polygraphic Co., supra.*)

II.

The Instant Case Is Not an Agreement for Arbitration Under California Law, and Therefore the California Courts Would Not Grant a Stay Here.

Appellee acknowledges that, assuming the instant contract does not involve interstate commerce under the Federal Arbitration Act, the issue is whether the contract is an agreement for arbitration under California law. In discussing this point, appellee injects certain extraneous elements which tend to confuse the real problems involved.

Appellee's references to the allegations in appellant's complaint have no bearing whatever on Point II of appellant's opening brief (to which appellee's Point II apparently is intended to correspond) which is concerned solely with the nature of the *contract* in question and not with the nature of the *dispute* which has arisen under it.[4]

Appellee injects further confusion into this problem by failing to differentiate the two types of arbitration referred to in Sections 1280 and 1281 of the *California Code of Civil Procedure,* namely; (1) "a provision in a written

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[4]In fact, in Point III of appellant's opening brief it is contended that none of the issues in this action are covered by the "arbitration provisions" of the contract.

contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, . . ." and (2) "an agreement in writing to submit an existing controversy to arbitration pursuant to section 1281 of this code, . . .". The present proceeding involves only the first type of arbitration agreement, and therefore the 1927 amendment to Section 1281 (which deals solely with arbitration of existing controversies), to which appellee purports to attach considerable weight, can have no bearing here.

Appellee contends that the fact that Section 1281, prior to the 1927 amendment, referred to controversies "which might be the subject of a civil action" served as the basis of *Rives-Strong Building v. Bank of America,* 50 Cal. App. 2d 810, 123 P. 2d 942 (1942); *Thompson v. Newman,* 36 Cal. App. 248, 171 Pac. 982 (1918),[5] and similar cases.[6] But it is significant that in *Rives-Strong, supra,* which was decided long after the 1927 amendment, the court took pains to minimize the importance of the 1927 amendment in regard to the problems under consideration there, stating at pages 813-814:

> "It should be noted that the provisions of the Code of Civil Procedure governing this subject have undergone substantial change since the making of the lease,

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[5]*Thompson v. Newman, supra,* is cited in appellant's opening brief for the proposition that the substance of an agreement rather than the use of such terms as "arbitration" are determinative as to whether the agreement is one for arbitration. Surely appellee cannot conscientiously quarrel with that proposition.

[6]It is submitted that the *Rives-Strong* case, *supra,* and similar cases cited by appellant, did not take the doctrinaire approach attributed to them by appellee, but turned rather on a comprehensive analysis of the underlying problems involved, as pointed out in appellant's opening brief.

> and the latter should be construed in the light of the statute as it existed at that time, notwithstanding the subsequent modification which in no way affected the provision now under consideration. However, in the view we take of it this does not assume the importance accorded it in the briefs."

The holding in *Cathcart v. Security Title etc. Co.,* 66 Cal. App. 2d 469, 152 P. 2d 336 (1944), cited by appellee, in no wise weakens the authority of the *Rives-Strong* line of cases.[7] The *Cathcart* case, *supra,* involved an order removing an arbitrator and appointing a substitute arbitrator. The court held that the appellant, having asked the court to enforce the arbitration agreement, was in no position to challenge the court's action on the grounds urged. In this connection the court stated at page 473:

> ". . . The appellant submitted the entire matter to the court, in effect asked the court to enforce the arbitration agreement, the court acted upon the issues presented, and the appellant is in no position to complain that her request was granted. The order appealed from was made for the purpose of carrying out and enforcing a judgment already entered in this equitable action and we think that under any point of view it was well within the court's powers . . ."[8]

Appellee's contention that the proceeding in the instant case is intended to deal with a matter as to which a civil

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[7]It should be noted that unlike the *Rives-Strong* case, which has been frequently cited by subsequent authorities, no case to date has cited the *Cathcart* case, *supra.*

[8]The *Cathcart* case, *supra,* involved an existing dispute under Section 1281, which, as pointed out above, is not the type of problem with which we are here concerned.

action could be and has been filed, combines two basic errors. First of all, the reference to the filing of a civil action in the pre-1927 version of Section 1281 of the *Code of Civil Procedure* could hardly be said to furnish a complete touchstone for the present proceeding; rather, the applicability of the statute must be determined from an analysis of the nature of the "arbitration provisions" in the contract under consideration, as was done in appellant's opening brief. Secondly, as pointed out earlier in this discussion, the subject matter of the *present dispute* cannot be relied upon to determine the nature of the *contract's* "arbitration" provisions.

In referring to appellant's analysis of the present contract in terms of California law, appellee distorts that claim to a point where it is unrecognizable. Appellant relied, not upon the fact that the "arbitration clause" provided for the presentation of the dispute to the arbitrators in writing rather than orally, but rather upon the absence of such indicia of arbitration as a hearing, cross-examination, and a determination based on the evidence presented by the parties.

Appellee's contention that arbitrators may secure advice and information independently misses the point of appellant's analysis, which was not concerned with the propriety of securing such advice in a proceeding which admittedly involved arbitration, but rather with the fact that the contract's express authorization for securing such advice, together with various other factors, indicates that arbitration proceedings of the type governed by the California statute were not contemplated in the present contract. Both of the authorities cited by appellee (*Bern-*

hardt v. Polygraphic Co., supra, and *Griffith Co. v. San Diego College for Women,* 45 A. C. 528, 534, 289 P. 2d 476 (1955)) involved the scope of permissible activity of arbitrators *assuming the existence of arbitration proceedings.* Thus, in *Griffith Co. v. San Diego College for Women, supra,* the court was concerned with an attempt to vacate an arbitrator's award based on alleged misconduct by an arbitrator in securing outside information. When the portion of the passage from the *Griffith* case [quoted from *Sapp v. Barenfeld,* 34 Cal. 2d 515, 212 P. 2d 233 (1949)] cited at page 16 of appellee's brief, is placed in the context in which it appeared in the *Griffith* opinion, it will be seen that the *Griffith* case and the *Sapp* case not only fail to support appellee's position, but actually support appellant's position. In this regard the court stated at page 534:

> " 'There is no error in such procedure. *Although a hearing is required on disputed questions of fact,* arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. (Sturges, Commercial Arbitration and Awards, §217, p. 495.) This procedure may be *ex parte,* without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions; provided that the award is the result of their own judgment after obtaining such information. . . .' " (Citing *Rives-Strong, supra,* and other cases; Emphasis added.)

Thus the passage taken in its entirety and in context illustrates, first, the necessity for a hearing on disputed fact questions in connection with arbitration proceedings, and secondly, the continued vitality of the *Rives-Strong* decision. Absent a hearing there is no arbitration within the sense of the California Statute.

Finally, it should be noted that appellant does not contend, as appellee indicates, that the present proceeding involves "valuation" matters. Rather, appellant has stated

> ". . . that the only question to be submitted to the certified public accountants was that of the accuracy of the accounting or, stated otherwise, the purely ministerial, non-judicial task of inquiring into the correctness of the accounting from sound accounting principles. . . ."

In short, we believe that the only adequate approach to the problem of determining whether the contract in the instant case involves arbitration under California law is to analyze the cases to determine the factors which are regarded by the courts as determinative of whether or not a given procedure is arbitration and then apply those factors to the contract involved. This was the approach adopted in appellant's opening brief, and we submit that it is far more enlightening than appellee's method of setting up and tearing down "catch words."

III.

None of the Issues Tendered in the Complaint Are Referable to Arbitration Under the Agreement.

Appellee's argument that the issues tendered in the complaint are referable to arbitration under the contract is premised on the unfounded assumption that those issues involve mere matters of classification for accounting purposes. Actually, the issues involve a series of contractual breaches by appellee in connection with which the complex legal principles for determining whether a breach exists, the nature of the breach, possible excuses for the breach, etc., are brought into play. This is obviously a far different problem than that of determining whether a given item should be classified in a particular manner for accounting purposes. In short, the distinction to be drawn is not, as appellee suggests, between matters of bookkeeping and matters of accounting, but rather the significant difference between matters of accounting, as covered by the terms of the agreement, and complex questions of law, as are involved in the present action.

Pacific Indemnity Co. v. Insurance Co. of North America, 25 F. 2d 930 (C. C. A. 9, 1928), cited by appellee, is out of point in the present context. The question involved in *Pacific Indemnity Co., supra,* was the scope of the state arbitration law, not the scope of a particular agreement. In fact, the arbitration clause in that case referred to "any difference hereinafter arising between the contracting parties with reference to *any transaction under this agreement* . . ." (emphasis added), a provision which is in striking contrast to the narrowly worded "arbitration clause" in the present contract, which is limited to controversies *"as to any accounting* by Pur-

chaser with respect to the share of Pictures in the net profits of the picture."

We have no quarrel with appellee's suggestion that the language of the present contract indicates that the parties foresaw the possibility of accounting controversies and sought to make provision for such controversies in their contract. But the point which appellee overlooks is that *no such accounting controversy is involved here.*

IV.

Appellee Is in Default in Proceeding With Arbitration.

Appellant will rely on his presentation of this issue in his opening brief.

Conclusion.

Appellee has attempted to becloud the issues involved in this appeal by giving labels of its own choosing to appellant's contentions, and then assaulting the straw men it has thus created. Appellee has compounded this confusion by failing to differentiate the several distinct problems involved in this appeal. Thus, in answer to appellant's demonstration that the isolated local sales *transaction* involved here does not come within the scope of the Federal Arbitration Act, appellee speaks of the motion picture *industry* and quotes a few random phrases from the contract out of context.

In answer to appellant's analysis of the *contract* to show that it does not contain provisions for arbitration, as that term is defined by the California authorities, appellee creates and attacks the label "valuation" and speaks in terms of the issues raised by the *complaint* in the present action, rather than in terms of the *contract.*

In answer to appellant's contention that the present action involves issues of law not within the scope of the "accounting" provisions of the contract, appellee creates the label "classification" and extols the virtues of accountancy. We suggest that when the confusion thus created by appellee's brief is removed, it will be seen that appellee has in no wise impaired the validity of appellant's contentions.

Respectfully submitted,

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